

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1930

To be argued by
Roy L. Reardon

74-1930

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SERGIO POBLETE

Defendant-Appellant

DEFENDANT-APPELLANT'S APPENDIX



ROY L. REARDON
Attorney for Defendant-Appellant,
Sergio Poblete
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

MARTHA S. MYERS

* Of Counsel

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
1. Criminal Docket, United States District Court, <u>United States</u> <u>v. Sergio Poblete</u> , 74 Cr. 383 (72 Cr. 871)	1
2. Indictment, <u>United States v.</u> <u>Sergio Poblete, et al.</u> , 72 Cr. 871	6
3. Motion to Dismiss and Affidavit dated July 5, 1974, 74 Cr. 383 (72 Cr. 871)	10
4. Record of transcript of Proceedings dated July 8, 1974	16 (Tr. 1-40a)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CASE NO. 74-19930		U.S.A. v. Sergio Poblete	
DATE	FILINGS PROCEEDINGS		Filed
7-9-74	Filed copies of docket entries and notice of appeal		
7-16-74	Filed record (original papers of district court)		
7-16-74	Filed Financial Affidavit		
8-16-74	Filed order: removal of record; 7 xerox copies of appellant's brief and appendix by 9-16-74 w/dismissal in default; U.S. brief and appendix if any, by 10-16-74; argument ready to be heard week of 11-11-74		
9-12-74	Filed motion for an extension of time to file appellant's brief and appendix, w/pfs		
9-13-74	Filed amended order: appellant's brief and appendix by 9-30-74 w/dismissal in default; U.S. brief by 10-30-74; argument ready to be heard week of 11-4-74		
9-27-74	Filed motion for leave to extend time to file appellant's briefs and appendices to 11-15-74		
10-7-74	Filed order: appellant's brief and appendix by 11-11-74 w/dismissal in default; U. S. brief by 12-11-74; argument to be heard week of 12-16-74		
10-16-74	Filed motion for leave to be relieved as counsel on appeal, and for assignment of counsel, with pfs (Legal Aid)		
10-18-74	Filed order granting leave to be relieved as counsel on appeal and for appointment of new counsel under CJA		
11-22-74	Filed order: Roy L. Boudreau, Jr., having been appointed; transcript by 1-22-75; removal of record; 7 xerox copies of appellant's brief and appendix by 2-2-75 w/dismissal in default; U.S. brief by 1-22-75; argument ready to be heard week of 2-3-75		

TITLE OF CASE

THE UNITED STATES

vs.

SERGIO POLETE

For U.S. AUSA CLAYTON

For Defendant:

Did sell cocaine not in original stamped package

ABSTRACT OF COSTS

AMOUNT

CASH RECEIVED AND DISBURSED

DATE

NAME

RECEIVED

DISBURSED

Fine,

Clerk,

Marshal,

Attorney,

Commissioner's Court,

Witnesses,

DATE

PROCEEDINGS

5-17-74 Information & Waiver of Indictment filed.
 5-17-74 Before WEINSTEIN J - case called - deft & counsel E.Kelly of
 Legal Aid present - Emanuel Ros sworn as interpreter - Deft signs
 Waiver of Indictment - deft arraigned and having been advised of
 his rights by the court and on his own behalf enters a plea of
 guilty as charged - sentence adjd without date.

7-5-74 Notice of motion to dismiss filed ret. 7-8-74 at 9:30 A.M.

7-8-74 Before WEINSTEIN J - case called - Deft present with counsel
 Legal Aid Society by E.Kelly present - ~~maxim~~ deft sentenced
 to imprisonment for a period of 5 years. Motion to withdraw guilty plea
 denied.

7-8-74 Judgment and Commitment filed - certified copies to Marshal.

7-8-74 Notice of Appeal filed.

7-8-74 Docket entries and duplicate of Notice of Appeal mailed to C of A

72CR 871

WEINSTEIN,
74CR383

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.:

15.

SERGIO POBLETE, OSCAR POBLETE, RAUL HORMOZABAL,	
ELIANA MERINO, ROBERTO NIETO, LOUIS CAROL OTEY AMPUERO,	
a/k/a "Carol", GERMAN FOO, MARTIN FERNANDEZ-MEYER,	
a/k/a "Alex", LOUIS BOBADILLA, HUGO PINEDA,	
FRANK RAMOS, JOHN DOE, a/k/a "El Flaco Varela",	
JOHN DOE, a/k/a "Manolo"	

For Defendant: **FRANK RAMOS**
~~Alvin Geller~~ L. Rub

299 Broadway, NYC

BE 3-3330

POBLETE-Legal Aid

Conspiracy to import cocaine into the U.S.

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	
Fine,						
Clerk,						
Marshal,						
Attorney,						
Commissioner's Court,						
Witnesses,						

DATE _____

PROCEEDINGS

7-20-72 Before BARTELS, J.- Indictment filed. Bench warrants ordered/issued

7-25-72 Before DODLING J - Case called - Deft FRANK RAMOS produced on a
Bench Warrant - counsel A.Geller present - deft arraigned & enters
a plea of not guilty - deft to furnish a P.A. bond in the sum of
\$25,000 to be secured by the deposit of the deed to 405 New York
Avenue Lindenhurst, N.Y. with the Clerk of the Court - posting of
bail stayed until July 27, 1972.

7-25-72 Notice of Appearance filed (deft FRANK RAMOS.)

7-28-72 ~~Wxxxxxxdxxandxfildxxxkxremrxdx~~ Petition for Writ of Habeas
Corpus Ad Prosequendum filed.

7-28-72 By Weinstein J - Writ Issued, ret. August 7, 1972 (Oscar Poblete)

8-4-72 Notice of motion filed returnable 8-11-72 for a bill of particulars
deft. FRANK RAMOS.

72CR 871

DATE	PROCEEDINGS
8-4-72	By WEINSTEIN, J. - Order filed that pretrial conference shall be held on August 7, 1972 at 2:30 A.M.
7-72	Before WEINSTEIN J - Case called for Pre Trial and pleading, etc. Deft RAMOS & counsel Leonard Rubin present - Notice of Appearance filed by counsel - Pre Trial Conference held and concluded - defts motion for Bill of Particulars granted in part - govts motion for notice of alibi defense granted. defts bail of \$25,000 personal bond secured with deed to house continued - trial set for January 8, 1973. deft POBLETE not present pleading and pre trial conference as to him adjd to Aug. 11, 1972 at 2:00
8-7-72	Notice of Appearance filed (RAMOS)
8-10-72	Magistrate's file 72 M 1504 inserted into criminal file.
10-72	Before WEINSTEIN J - Case called - Deft POBLETE & counsel Michael Santangelo present - deft requests appt of counsel and accepts Mr. Santangelo as counsel - Deft arraigned and enters a plea of not guilty - Pre Trial Conference held - deft to be held at Federal Detention House, West St., NYC. for 30 days etc. Trial set for Jan. 8, 1973.
7-72	Before WEINSTEIN J - Case called on defts motion for Bill of Particulars (Frank RAMOS) Deft & counsel present - motion granted in part - trial set for Jan. 8, 1973.
5-72	Letter of Sept. 1, 1972 filed received from Chambers of Judge Weinstein from counsel Santangelo re deft Sergio Poblete. (granting extension etc)
5-72	By Weinstein J - Order filed granting extension. (see Order on front of letter dated 9-1-72.
7-72	Notice of motion filed for a bill of particulars, inspection, etc.
20-72	Before Weinstein J - Case called - Motion denied except as granted at pre trial with leave to deft to reapply for relief after consulting with U.S. Atty, etc.
3/73	Before WEINSTEIN, J.- Case called- Defts not present-Counsels Mr. Rubin and Mr. Santangelo present-Govts application for adjournment of trial scheduled for 1/8/73 is granted to 1/31/73-Motion by deft Poblete for an investigator in forma pauperis is granted-Order to be submitted.
5/72	Govt's Bill of Particulars and Items of Discovery filed.
11/73	Before WEINSTEIN, J.- Case called- Trial adjd to 3/26/73 at 10:00 A.M.
16/73	Notice of Readiness for Trial filed.
6-73	Before WEINSTEIN J - Case called & trial adjd to 4-23-73.
10/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (VIAL)
10/73	By BARTELS, J. Writ issued, re: 7/23/73.

CRIMINAL DOCKET 72CR871

D C. 100

EJB:TPP:lag
P.#721,543

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

- against -

SERGIO POBLETE
OSCAR POBLETE
RAUL HORMOZABAL
ELIANA MERINO
ROBERTO NIETO
LOUIS CAROL OTEY AMPUERO, aka "Carol"
GERMAN POO
MARTIN FERNANDEZ-MEYER, aka "Alex"
LOUIS BOBADILLA
HUGO PINEDA
FRANK RAMOS
JOHN DOE, aka "El Flaco Varela"
JOHN DOE, aka "Manolo",

Defendants.

----- X
THE GRAND JURY CHARGES:

From on or about January 1, 1970 up to and including the date of filing of this indictment, within the Eastern District of New York, and elsewhere, the defendant SERGIO POBLETE, the defendant OSCAR POBLETE, the defendant RAUL HORMOZABOL, the defendant ELIANA MERINO, the defendant ROBERTO NIETO, the defendant LOUIS CAROL OTEY AMPUERO, aka "Carol", the defendant GERMAN POO, the defendant MARTIN FERNANDEZ-MEYER, aka "Alex", the defendant LOUIS BOBADILLA, the defendant HUGO PINEDA, the defendant FRANK RAMOS, the defendant JOHN DOE, aka "El Flaco Varela", and the defendant JOHN DOE, aka "Manolo", together with Mario Sepulveda and Celestino Valverde, named herein as co-conspirators, but not as defendants, and others known and unknown to the Grand Jury, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

It was part of said conspiracy that the defendants would

72CR 871

Cr. No.
(21 U. S. C., §§173 and 174)

WEINSTEIN, J.
Filed: 7/20/72

- 2 -

fraudulently and knowingly import and bring into the United States large amounts of cocaine, a narcotic drug, from and through Chile, and other countries unknown to the Grand Jury, contrary to law.

It was further a part of said conspiracy that the defendants would unlawfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large amounts of cocaine, a narcotic drug, after the narcotic drugs had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed within the Eastern District of New York and elsewhere:

O V E R T A C T S

1. On or about January 10, 1970, in Santiago, Chile, OSCAR POBLETE and SERGIO POBLETE delivered five (5) kilograms of cocaine to RAUL HORMOZABAL and Mario Sepulveda for shipment to the United States. *VICTOR DRAGON*
2. On or about January 10, 1970, RAUL HORMOZABAL and Mario Sepulveda, as stowaways aboard the S.S. Santa Lucia, departed from Valparaiso, Chile with five (5) kilograms of cocaine.
3. On or about January 25, 1970, at Newark, New Jersey, RAUL HORMOZABAL and Mario Sepulveda left the S.S. Santa Lucia with five (5) kilograms of cocaine.
4. On or about January 25, 1970, RAUL HORMOZABAL and Mario Sepulveda delivered five (5) kilograms of cocaine to SERGIO POBLETE at the San Carlos Hotel in Manhattan.
5. On or about January 25, 1970, SERGIO POBLETE handed a leather valise containing five (5) kilograms of cocaine to ELIANA

MERINO at the San Carlos Hotel in Manhattan.

6. On or about February 11, 1970, Mario Sepulveda met with SERGIO POBLETE and OSCAR POBLETE at the San Carlos Hotel in Manhattan and had a conversation concerning the removal of cocaine from a vessel.

7. On or about February 18, 1970, OSCAR POBLETE, ROBERTO NIETO, ELIANA MERINO and Mario Sepulveda travelled by automobile from New York to Norfolk, Virginia for the purpose of removing cocaine from a vessel.

8. On or about February 24, 1970, OSCAR POBLETE, ROBERTO NIETO, ELIANA MERINO and Mario Sepulveda drove to a pier in Wilmington, North Carolina.

9. On or about February 24, 1970, at Wilmington, North Carolina, LOUIS CAROL OTEY AMPUERO, aka "Carol" delivered seven (7) kilograms of cocaine to ROBERTO NIETO and Mario Sepulveda aboard the S.S. Maipo.

10. During the first week of March 1970, OSCAR POBLETE travelled from New York to Santiago Chile.

11. On or about April 1, 1970, Celestino Valverde travelled by airplane from John F. Kennedy International Airport in Queens, New York to Santiago, Chile in order to arrange for the shipment of cocaine to the United States.

12. On or about May 2, 1970, RAUL HORMOZABAL, MARTIN FERNANDEZ-MEYER, aka "Alex", LOUIS BOBADILLA, JOHN DOE, aka "El Flaco Varela", Celestino Valverde, and Mario Sepulveda met at Sepulveda's apartment in Manhattan.

13. On or about May 2, 1970, at Pier #40 in Manhattan, MARTIN FERNANDEZ-MEYER, aka "Alex", LOUIS BOBADILLA and Mario Sepulveda received six (6) kilograms of cocaine from Celestino Valverde aboard the S.S. Santa Lucia.

14. On or about May 2, 1970, at Mario Sepulveda's apartment in Manhattan, RAUL HORMOZABAL and JOHN DOE, aka "Manolo" had a conversation concerning one and one-half (1 1/2) kilograms of

cocaine.

15. On or about May 3, 1970, HUGO PINEDA received three (3) kilograms of cocaine from Mario Sepulveda at Sepulveda's apartment in Manhattan.

16. On or about May 11, 1970, OSCAR POBLETE and Mario Sepulveda met with GERMAN FOO at a park near the Brooklyn waterfront.

17. On or about May 12, 1970, at Brooklyn, New York, LOUIS BOBADILLA and Mario Sepulveda received eight (8) kilograms of cocaine from GERMAN FOO aboard the S.S. Nueva Imperial.

18. On or about May 16, 1970, MARTIN FERNANDEZ-MEYER, aka "Alex", LOUIS BOBADILLA, and JOHN DOE, aka "El Flaco Varela" purchased one (1) kilogram of cocaine from Mario Sepulveda at Sepulveda's apartment in Manhattan.

19. On or about May 18, 1970, Mario Sepulveda met with FRANK RAMOS and OSCAR POBLETE in a blue automobile at 36th Street and Ninth Avenue in Manhattan.

20. On or about May 18, 1970, SERGIO POBLETE and Mario Sepulveda delivered one and one-half (1 1/2) kilograms of cocaine to FRANK RAMOS in the vicinity of the Cafe Madrid in Manhattan.

21. On or about June 19, 1970, OSCAR POBLETE and Mario Sepulveda travelled by automobile from New York to the waterfront in Baltimore, Maryland.

A TRUE BILL.

FOREMAN

ROBERT A. MORSE
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- :

SERGIO POBLETE, :

Defendant. :

MOTION TO DISMISS

74 CR 383

(72 CR 871)

-----X
S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWARD J. KELLY, duly sworn to this 5th day of July, 1974, and upon all the papers and proceedings heretofore and herein, the undersigned will move this Court, before the Honorable JACK B. WEINSTEIN, in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on July 8, 1974 at 9:30 A.M., or as soon thereafter as counsel may be heard, for an order dismissing the information, 74 CR 383 and the indictment, 72 CR 871, filed in the above captioned case, for lack of jurisdiction over the person of the defendant, pursuant to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure; and for such other and further relief as to the Court may seem just and proper.

DATED: BROOKLYN, NEW YORK
July 5, 1974.

Yours, etc.,

WILLIAM GALLAGHER, ESQ.,
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York 11201

TO: DAVID D. TRAGER, ESQ.,
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

CLERK OF THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
-against- :
SERGIO POBLETE, :
Defendant. :

AFFIDAVIT

78 CR 383
(72 CR 871)

-----X
STATE OF NEW YORK)
COUNTY OF KINGS) SS:

EDWARD J. KELLY, being duly sworn, deposes and says:

1. He is an attorney associated with WILLIAM GALLAGHER, ESQ., Federal Defender Services Unit/The Legal Aid Society, the attorney of record assigned to represent the defendant herein, SERGIO POBLETE.

2. This affidavit is submitted in support of defendant's motion, pursuant to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, for an order dismissing the information and the indictment in the above captioned case, on the ground that the Court lacks jurisdiction over the person of the defendant; and for such other and further relief as to the Court may seem just and proper.

3. In an indictment filed July 20, 1972, the defendant, together with twelve others, was charged with a conspiracy to import large quantities of cocaine into the United States, etc., in violation of §§173 and 174 of Title 21, United States Code. (Copy of indictment attached). This was one of a number of narcotic drug prosecutions which were based on information and testimony provided by one Mario Sepulveda.

4. On May 6, 1974, after the defendant had been brought into this country by American authorities during the prior week, he was assigned counsel, Ms. Joanna Seybert of this office, arraigned and entered a plea of not guilty. The case was adjourned to May 8, 1974 for a pre-trial conference.

On May 8, 1974, after discovery had been effected by Ms. Seybert with the Assistant United States Attorney in charge of the case, Charles Clayman, this counsel spoke with the defendant for approximately two hours in this building with the assistance of a Spanish interpreter. Ms. Paulette Harary. During this interview, counsel focused upon the allegations of the indictment and the eliciting of defendant's response to the charges. Although aware of some irregularity involving defendant's presence in this country, little attention was given to this because of what counsel considered the fixed state of the law in this area and its recent confirmation by Chief Judge Mishler in the case of United States v. Toscanino, 72 CR 194, then on appeal.

At the end of the interview, the defendant indicated a willingness to plead guilty to a lesser charge offered by the United States, the so called "tax count" (§4704 (a), Title 26, United States Code), and counsel advised the defendant that this could be an appropriate disposition of the case. However, just shortly before the defendant was to plead guilty, at 2:00 P.M., he indicated a desire for further reflection upon his plea, and the case was adjourned to May 17, 1974 at 10:00 A.M. for trial or a plea of guilty.

5. On May 13, 1974, with the assistance of a Spanish interpreter, Manuel Ras, counsel interviewed the defendant at the West Street jail and defendant indicated that he would plead guilty to the reduced charges. All pleading procedures, including waiver of indictment, were explained to the defendant. On May 17, 1974, therefore, again with the assistance of interpreter Ras, the defendant waived indictment and pleaded guilty to an information, 74 CR 383 (copy of information attached). Sentencing was adjourned for the preparation of a probation report and to provide the United States Attorney with the opportunity of receiving intelligence information from the defendant concerning traffic in narcotics.

6. On May 24, 1974, one week later, a batch of slip sheet opinions of the United States Court of Appeals arrived in our office. Among these was the decision in United States v. Toscanino, decided May 15, 1974, and counsel read this opinion for the first time. In the light thereof, the manner in which the defendant had been brought into this country took on great significance and steps were taken to explore this aspect of defendant's case more fully.

7. On May 29, 1974 counsel interviewed the defendant at West Street with the assistance of Ms. Margarita Mensa, a Spanish interpreter. The defendant gave an account of his arrest, interrogation and torture in Chile prior to his coming to the United States and had prepared a written, summary account for counsel. This is attached hereto as an exhibit, with accompanying English translation by Ms. Mensa. It is defendant's belief that what was done to him was at the behest of American authorities and that Chilean authorities were acting as the agents of the United States. Indeed, defendant believes one or more of his interrogators during the period of his custody and torture were Americans because of the manner in which they spoke Spanish.

8. On May 4, 1974, the defendant and five others were "expelled" from Chile, placed on a Braniff Airliner and brought to the United States by American agents (see attached newspaper photo and account in Spanish). One of those "expelled" with defendant was Carlos Baeza Baeza. What is alleged concerning him and his coming to this country points up the gravity of the issues involved here and the necessity of exploring fully the background of American official involvement in the uncivilized manner in which defendant was treated.

9. In an affidavit filed in United States v. Carlos

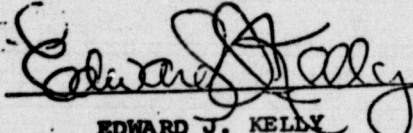
Baeza et al., 74 CR 14, Mr. Scribner, counsel for Baeza, recounts the following:

At present Mr. Fisher (Ivan Fisher, attorney for Baeza) has been informed that Baeza was transported to the United States from Chile without formal extradition proceedings and in violation of Chilean law. Specifically, Baeza was arrested and held incommunicado in Chile, and in fact was held under a name, Juan Silva Fuente, made up by the police so no one would find him. Second, while being held he was tortured. Third, Mr. Fisher has been informed that a Chilean court has ruled that Baeza's capture was unlawful under Chilean law. Though it is the government's position that Baeza was expelled from Chile, yet even if this is the case, and in view of the Chilean court order, it may not be the case, still under the Chilean law someone who is expelled is entitled to a choice of three countries to go. Here, no choice was given to Baeza. It is more than passingly strange or coincidental that when Baeza was released or expelled by the Chilean Junta, a waiting Braniff Airliner whose first class section was reserved by the United States government, was then and there available to take Baeza and six others to the United States, manacled and in the company of Drug Enforcement Administration agents who had been flown from the United States to Chile for that purpose (pp. 6, 7, motion and affidavit filed June 17, 1974)

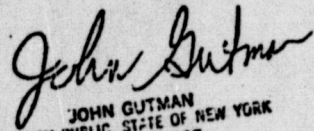
10. Counsel believes that the United States should respond at a hearing to these allegations of its official involvement in the circumstances of the case and provide the Court with information in this regard which is peculiarly within its control. In this manner, the Court may determine the issue of whether defendant was so deprived of his due process rights in his being brought to this country that this Court does not properly have jurisdiction over his person, according to the holding in Toscanino.

11. WHEREFORE it is respectfully urged that defendant's motion, pursuant to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, be granted; or in the alternative that a hearing be held to determine such issues as have been raised;

and for such other and further relief as to the Court may
seem just and proper.


EDWARD J. KELLY

Sworn to before me this
5th day of July, 1974.


JOHN GUTMAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4506057
Qualified in Kings County
Commission Expires March 30, 1975

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

- against - : 74-CR-383

SERGIO POBLETE, :

Defendant. :

----- x

United States Courthouse
Brooklyn, New York
July 8, 1974

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

EMMANUEL KARR hereby certify that the foregoing is a
true and accurate transcript from my sten-
ographic notes in this proceeding.

Official Court Reporter
U. S. District Court

1
2 **A p p e a r a n c e s :**

3 DAVID G. TRAGER,
4 United States Attorney
 for the Eastern District of New York

5 BY: PAUL BERGMAN, ESQ.,
6 EDWARD R. KORMAN, ESQ.,
 BERNARD FRIED, ESQ.,

7 Assistant United States Attorneys

8
9 EDWARD J. KELLY, ESQ.
10 Attorney for Defendant

11 LEGAL AID SOCIETY

12
13 MARGARET MENSA,
14 Interpretor.

15 - - -

1 THE CLERK: The United States of America versus
2 Sergio Poblete, for sentence.

3 MR. KELLY: Judge, at this time I would ask the
4 Court to consider my motion in which I move to dismiss
5 both the indictment and the information on the grounds
6 that the Court lacks jurisdiction under Toscanino,
7 also Birdzell and also under Stonehill.

8 THE COURT: In view of that motion, I think we
9 ought to hold a hearing forthwith.

10 Are you prepared to go forward with a hearing?

11 MR. KELLY: I am, and let me say I am ready
12 because Judge Mishler is having a similar type of hear-
13 ing with respect to Baeza, one of the other gentlemen
14 who came into this country. I spoke with Judge Mishler
15 and he indicated that he would be willing to consolidate
16 this hearing with the hearing he is going to have on
17 the Baeza case.

18 THE COURT: I prefer to hold the hearing myself
19 since this case was assigned to me for all purposes. I
20 will hold it this morning.

21 MR. BERGMAN: Your Honor, may I merely say this,
22 Mr. Clayman who has this case in the office is on trial
23 before Judge Judd. He gave me the file just before I
24 came into Court this morning and asked me to tell your
25 Honor that he would be available next week for a hearing.

1 I might say that these motion papers were re-
2 ceived by the United States Attorney on Friday of last
3 week.

4 THE COURT: Well, let us hear the defendant's
5 case. If we need a continuance in order for the United
6 States Attorney to meet the case, I will give it to you
7 in due course.

8 I see no reason for delaying the matter.

9 MR. BERGMAN: May I just have a brief adjourn-
10 ment to contact Mr. Clayman perhaps, Judge, for just
11 a few moments.

12 THE COURT: 11:00 o'clock for trial.

13 Thank you.

14 I have received in this case a letter from Mr.
15 Poblete, it reached me this morning. I'm turning it
16 over to counsel for the defendant because I intend to
17 have it translated at the hearing. I assume that it
18 refers to the sentence.

19 Counsel for the defendant may want to go over it
20 with his client.

21 MR. KELLY: All right, thank you, your Honor.

22 (An adjournment was taken in the matter until
23 11:00 o'clock a.m.)

24 (At 11:00 o'clock a.m. the matter continued.)

25 (Bernard Fried, Esq., Assistant United States

1 Attorney, then took over the matter on the part of the
2 Government.)

3 THE COURT: Has the interpreter been sworn?

4 INTERPRETOR: I was sworn before your Honor at
5 9:30.

6 THE COURT: You remain under oath.

7 (All matters then before the Court were inter-
8 preted through the interpreter.)

9 MR. KELLY: Judge, I would like to amend my
10 motion orally and to ask for relief other than that
11 requested in the motion.

12 I would ask at this time to withdraw the defen-
13 dant's guilty pleawhich was entered on May 17th. I
14 believe that this is a discretionary matter on the part
15 of your Honor. I believe that there are circumstances
16 that would form the basis for your Honor exercising his
17 discretion in it and allowing the defendant to with-
18 draw his guilty plea at this time.

19 At the time I spoke with the defendant and he
20 pleaded guilty, but I knew very little about the details
21 and the circumstances under which he was brought in to
22 the United States. I did not go into them because I
23 felt that in the state of the fixed law of that time
24 and the decision of Judge Mishler in the Toscanino case,
25 which was then under appeal, that any defense with respect

1 to jurisdiction over the defendant was not viable at
2 that time.

3 As I've indicated in my papers, a week after the
4 defendant pleaded guilty I read the Toscanino decision
5 for the first time. I admit I should have kept track
6 of the Law Journal, and if there is some question as
7 to the competency of counsel involved here, I am will-
8 ing to take the blame for that.

9 I think in view of all of the circumstances that
10 I have set forth in my papers that the defendant should
11 be allowed to withdraw his|not| guilty plea and enter
12 a plea of not guilty.

13 I think the Federal rule is very liberal in that
14 regard.

15 I wasn't able to find cases in the second Circuit,
16 but there are two cases, United States against Vilosko,
17 471 F.2d 294, and United States against Webster, 468
18 F.2d 769. They are 9th Circuit cases and stand for the
19 proposition that a motion to withdraw a plea before the
20 imposition of sentence should be liberally construed
21 by the Court, and that is what I would ask the Court to
22 do at this time.

23 Moving on, with respect to --

24 THE COURT: Let me take care of that branch of
25 your motion.

1 It is denied.

2 There is no reason to permit the withdrawal of
3 the plea. The inquiry made by the Court indicates that
4 the defendant is guilty, and the only issue is whether
5 the Court has jurisdiction. On that question I will
6 hear you.

7 MR. KELLY: Well, I have asked for the dismissal
8 of the indictment in my papers.

9 Your Honor, I have spoken with Mr. Fisher who
10 was involved in the Toscanino case and who has done a
11 great deal of investigation -- I feel really what I'm
12 asking at this time is not so much that the indictment
13 be dismissed with respect to this defendant for all
14 time, but actually I think what I'm asking for now,
15 after speaking with Mr. Fisher, is that should the Court
16 find that the defendant was brought here in violation
17 of his fourth amendment rights that he then should be
18 restored to the status quo ante that existed prior to
19 his coming here.

20 Your Honor, in the Toscanino case, on page 3508,
21 the Court says:

22 "Having unlawfully seized the defendant in viola-
23 tion of the fourth amendment, which guarantees" "the
24 right of the people to be secure in their persons against
25 unreasonable seizures," the Government should as a matter

1 of fundamental fairness be obligated to return him to
2 his status quo ante."

3 Your Honor, that would be to his status in
4 Chile before he was brought to the United States.

5 THE COURT: I will hear you.

6 Call your first witness.

7 MR. KORMAN: Your Honor, could I say something
8 at this point?

9 THE COURT: Yes.

10 MR. KORMAN: First, as to this motion, this motion
11 -- these motion papers were served on the United States
12 Attorney at 1:00 o'clock on the 5th of July, which was
13 of course just last Friday. It is hardly sufficient
14 time under the rules of this Court, nor was it practical
15 for us to prepare for a hearing in this matter, and as
16 a matter of fact the chief of the narcotics section
17 was out of the country at the time and the assistant
18 who is handling the case was before another Court.

19 In the second place, your Honor, I think the
20 papers are patently inadequate to warrant a hearing.
21 The only allegation of United States involvement is
22 just some bare surmise, a surmise that possibly the
23 United States was involved in the torture which pre-
24 ceded this expulsion from Chile.

25 Finally, even if the papers were adequate, we

1 would argue, number one, that the guilty plea waived
2 any claim to the jurisdiction of this Court;

3 Number two, if Mr. Kelly's statement is that the
4 reason the issue was not raised before the guilty plea
5 is that the law was different and that it has been
6 changed by Toscanino, we argue that the decision in
7 Toscanino cannot be applied retroactively to conduct
8 which occurred before the date of that decision. Under
9 the analysis employed in every retroactive decision of
10 the Supreme Court --

11 THE COURT: No, some of them apply to cases not
12 tried and completed.

13 MR. KORMAN: The more recent, the more recent
14 cases have set out as the controlling date the date
15 when the conduct which a particular exclusory rule is
16 designed to deter. As a matter of fact the most recent
17 opinion of the Supreme Court, Michigan against Tukka,
18 even cut back Johnson versus New Jersey and said that
19 as to the fruits of a violation of Miranda as opposed to
20 the confession, that in fact Miranda well can only apply
21 to questioning after the date of the decision.

22 Of course in this case we are dealing simply with
23 the rule of deterence which has absolutely no affect on
24 the integrity of the fact finding process.

25 It is clear that the defendant is guilty, and of

1 course his custody at this point in time is pursuant
2 to a valid order of this Court.

3 His guilty plea, it is not alleged, has in any way
4 been affected by any torture that may have preceded
5 his arrival into the United States.

6 The fact that the claim is jurisdictional, at
7 least is not really that significant in terms of the
8 retroactivity decision because I believe in Gosser
9 versus Madden, which involved the jurisdiction of a
10 courts marshal court to try offenses in which the Court
11 earlier held they had no jurisdiction to try certain
12 offenses, the Supreme Court refused to apply that deci-
13 sion retroactively.

14 Of course this Court does have jurisdiction in
15 the sense there is a valid indictment. Defendant is
16 here. And the question is simply whether it should re-
17 fuse to exercise the jurisdiction that it already has.

18 So that there is no reason in our judgement to
19 apply Toscanino retroactively.

20 Of course we agree with the defendant that it
21 did make a change in the well-settled law.

22 For all these reasons we don't believe that a
23 hearing should be held, and if your Honor intends to
24 hold a hearing, we believe we are entitled to the full
25 notice that the rules of this Court permits.

1 Your Honor, it is highly irregular, to say the
2 least, to be served by a motion on Friday, late Friday
3 and where really you only have the whole weekend and
4 to be here at 11:00 o'clock the following Monday to be
5 ready for a hearing.

6 As I can reiterate, there is not even an affidavit.
7 a sworn affidavit of the defendant where the allegations
8 are as thin as they are in this particular motion.

9 THE COURT: If you need any further time to appear,
10 we will have a continuance --

11 MR. KELLY: Your Honor, let me say this:

12 I realize that this motion was made at the
13 eleventh hour and I apologize.

14 I would be very willing to grant the Government
15 any adjournment they require.

16 I can only indicate that I was pressed with a
17 lot of matters before this Court and I thought very
18 long and hard before deciding that I had to make the
19 motion in this case, and that is why I made it at that
20 late hour.

21 I asked for the withdrawal of the not guilty plea
22 because I realized that there was some problem connected
23 with the defendant's plea of guilty in waiving this
24 particular defense. I did some research and I did find
25 that in the Rosenberg case this matter was considered

1 by the Court. There Mr. Sobell claimed his conviction
2 would be anullity if it were proved that the Court
3 secured the jurisdiction of the person in violation
4 of United States law and international agreements --
5 and this motion was by Mr. Sobell -- and asking for
6 the arrest of the judgement, which I think was denied
7 in that case, and the Court indicated that he had
8 waived his right to challenge personal jurisdiction in
9 the trial because he had not prior to the trial made
10 this motion, and also during the course of the trial
11 when the Government indicated that his presence in the
12 United States was achieved legally, he had not con-
13 fronted that question at that time; in other words,
14 the Court indicated that he preferred to take his chances
15 on the verdict, withholding his trump card until the
16 trial was over.

17 Now I realize that particular decision causes some
18 problems to me, but all I can say is that because of
19 the fixed state of the law I did not discuss fully with
20 the defendant, I did not know all the details of his
21 coming into this country;

22 I had not seen the Toscanino decision until about
23 a week after the defendant had pleaded guilty.

24 So I would say that I have not really lain back
25 in this case and depended on somebody else, as was done

1 in the Sobell case, but I do move, although belatedly,
2 to make this motion because I think I had to make it
3 under these circumstances.

4 THE COURT: Call your first witness, please.

5 MR. KELLY: All right.

6 Your Honor, there are just two things that
7 perhaps should be done at this time.

8 Your Honor earlier in the day gave me a letter
9 written in Spanish, typed in Spanish to your Honor,
10 which is dated the 30th of June.

11 I do not know if your Honor would want to have
12 that marked.

13 THE COURT: Yes, mark it as an exhibit in the
14 case.

15 MR. KELLY: Can we, may we have that marked as
16 defendant's Exhibit A?

17 There is also an English translation which Miss
18 Minna made between the time we were last before the
19 Court and now, and she has this English translation of
20 the Spanish.

21 I would like to have that marked as Defendant's
22 Exhibit B.

23 (Continued on next page.)
24
25

1 THE COURT: Mark it A-1.

2 (Two documents duly marked as Defendant's Exhibit
3 A and A-1 in evidence.)

4 MR. KELLY: Now, your Honor, would you wish be-
5 fore the hearing or after the hearing to have Miss
6 Minza read her English translation into the record?

7 I believe she would be able to do it --

8 THE COURT: That is not necessary, it is in the
9 record.

10 MR. KELLY: Pardon?

11 THE COURT: It is in the record now.

12 MR. KORMAN: Speaking of translations, your
13 Honor, there is a newspaper story clipping which is
14 attached to the motion papers that I would appreciate
15 if we could have translated by the interpreter.

16 THE COURT: She will give you any help you want.
17 Swear the witness, please.

18 MR. KORMAN: I would, since it is a part of the
19 record, ask that it be translated now so we know what-
20 ever is in the motion papers. This is in support of
21 the motion, if your Honor pleases, I don't know at this
22 point what it says, I would like it translated right
23 now.

24 THE COURT: Before he testifies?

25 MR. KORMAN: Yes.

1 As it is we are not prepared to cross-examine,
2 but I would at least like to know what this particular
3 exhibit is all about.

4 THE COURT: All right.

5 You can translate it during the recess.

6 THE INTERPRETOR: Yes.

7 MR. KELLY: Your Honor doesn't want her to trans-
8 late it now?

9 THE COURT: No, I want your witness.

10 All right.

11 I'm ready to hear any testimony if he has any
12 testimony to give.

13 MR. KELLY: I will call the defendant.

14 S E R G I O P O B L E T E, called as a witness on his own
15 behalf, having been duly sworn by the Clerk of the
16 Court, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. KELLY:

19 Q Now, Mr. Poblete, how old are you?

20 A I am almost fifty-three years old now.

21 Q Where were you born?

22 A In Calbuco, Chile.

23 Q How much education have you had?

24 A I went to school for three years.

25 Q Of what country are you a citizen of?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A I am a Chilean.

Q Have you ever renounced your Chilean citizenship?

A No, sir.

Q Are you a citizen of any other country?

A No.

Q Now, directing your attention to November 13, of 1973, directing your attention --

MR. KELLY: Your Honor, I am reading from the English translation of the defendant's statement attached to the affidavit.

Q Directing your attention to November 13, 1973, were you in the City of Annergusto at that time?

A Yes, it was the time I was arrested.

Q And would you tell us your purpose in being in that city at that time?

A I left Santiago because when the military junta took power they began arresting everybody.

MR. FRIED: I object to this as being irrelevant to the issues.

THE COURT: Overruled.

A They began arresting everybody with a criminal record.

Q And was there any other purpose for your being

1
2 in Annergusto?

3 A Yes, because my aunt who is also my god-mother
4 was dying from cancer at the time.

5 Q Now, did there come a time while you were in
6 Annergusto that you were arrested by the police?

7 A Yes, I was arrested in my house and I was taken
8 to the place of investigation.

9 Q What happened when you were taken to the place
10 of investigation?

11 A I was taken there and they began questioning
12 me. They asked me about what I had done in the United States,
13 they asked me what was the last time that I had been in the
14 United States, they asked me if I knew of any laboratories in
15 the United States and they blindfolded me and they took me up
16 stairs, and upstairs they gave me electric shocks.

17 Q Were you told at any time the purpose for which
18 you had been arrested?

19 A Yes, I was told that they had received an order
20 by the United States.

21 Q Were you given the assistance of counsel at any
22 time during these interrogations?

23 A No, sir, no, they kept me incommunicado.

24 Q Will you detail the specific types of mistreatment
25 that were applied to you at this time?

1
2 A They strapped me to a chair, they blindfolded
3 me and they placed a bag over my head so I couldn't see any-
4 thing. Then they began applying electric shocks on my testicles
5 and all over my body, at the same time they beat me very severely.

6 Q How long did their interrogation and mistreatment
7 continue in Annergusto, Mr. Poblete?

8 A I received electric shocks on three occasions
9 and I spent a total of seven days in Annergusto.

10 Q Did there come a time when you were taken from
11 Annergusto to another place?

12 A Yes, I was taken to Santiago.

13 Q Where were you taken in Santiago, if you know?

14 A To the National Department of Investigations.

15 Q Were you told when you were brought to Santiago
16 the reason for your being brought to Santiago?

17 A I was told that they had received an order from
18 the United States.

19 Q And what happened to you when you were brought
20 to Santiago?

21 A A little while after I arrived in Santiago, a
22 little after I arrived in Santiago the tortures began again,
23 they strapped me to a chair, I was again blindfolded and again
24 they placed a bag over my head. They administered electric
25 shocks again and they hit me and they beat me all over my body.

They also hung me from my arms in my back and my cheekbone is broken and they also broke my nose and they pulled one of my nails out from my right hand and my arms were completely swollen --

MR. KELLY: Your Honor, may I at this time --

A I passed out several times.

MR. KELLY: Your Honor, may I indicate to the Court and show the Court which one of the fingers of the defendant is distorted by some instrument.

(At this point the defendant removed his jacket and indicated points on his body where there were signs of mistreatment.)

THE WITNESS: My bones are out of place.

MR. KELLY: Let me just also draw the Court's attention --

THE WITNESS: My bones on my shoulders are completely out of place because they hanged me for a long time.

MR. KELLY: I also would like you to draw the Court's attention to the fact that there is an indentation on the side of this defendant's face which he has indicated to me is the place where he was struck and a bone broken.

THE COURT: The Court notes it for the record.

1
2 Let me see your hand.

3 The third finger of the right hand just shows
4 signs of having been injured and there is an indenta-
5 tion on the left cheekbone just beneath the eye.

6 BY MR. KELLY:

7 Q Now, would you tell us how long this interroga-
8 tion and mistreatment lasted while you were in Santiago,
9 Mr. Poblete?

10 A They kept me there for about ten to fifteen
11 days. I don't remember exactly. At times they would take
12 me out at night, sometimes they would take me out in the morn-
13 ing.

14 Q Well, during this period of time that you were
15 in Santiago, were you continuously interrogated and mistreated
16 or were there times when you were not subjected to this treat-
17 ment?

18 A The torture was almost continuous, sometimes
19 they would take me out in the morning and then later on they
20 would place me back in the dungeon sometimes at night, but it
21 was almost continuous.

22 Q During this time, did you have an opportunity of
23 consulting with an attorney?

24 A No, sir, no, I was kept incommunicato.

25 Q Were the men who interrogated you during this

1
2 period in Santiago all Chileans or were they, if you know,
3 individuals from other countries?

4 A No, there were men from other countries, I could
5 tell because of their accent.

6 Q Do you know for a fact whether any Americans
7 were involved in your interrogations or mistreatment?

8 A I cannot tell you -- I cannot tell you for sure
9 that there were Americans involved, but I do know there were
10 Americans around in the Department of Narcotics down there.

11 Q Now, did there come a time when you were taken
12 from Santiago to some other place?

13 A I was taken to the Chile stadium which is a
14 concentration camp for political figures.

15 Q How long did you stay at that stadium?

16 A I was there under arrest until the day I was
17 brought to the United States, which I believe was May 4th.

18 Q Do you recall the circumstances under which you
19 left Chile to come to the United States?

20 A I was taken out of the stadium and at the time
21 I thought that maybe I was going to be taken to another prison
22 or maybe I was going to be released. They placed me inside
23 a police car together with another five persons, all of us
24 were handcuffed, and they took us to the airport. From there
25 we were placed aboard a plane and flew to Lima.

1
2 Q Now, let me ask you this, Mr. Poblete:

3 At the time you were placed aboard the airplane,
4 in whose custody were you at that time?

5 A Under American and Chilean policemen.

6 Q When you were placed on the airplane and the
7 airplane left for Lima, in whose custody were you at that
8 time?

9 A Under the surveillance of American and Chilean
10 police because several American policemen also were aboard
11 the plane.

12 Q Now, at any time, if you know, were you given
13 the reason for your being taken out of Chile?

14 A No, I was not told anything except that we were
15 going to the United States.

16 Q Were you at any time given a choice as to which
17 country you should go to?

18 A No, no, we were handcuffed when we were placed
19 in the police car, from there we went to the plane, and we
20 arrived in Lima, Peru, and in Lima there was some policemen
21 with machine guns guarding us all the time inside a little
22 room, we were also handcuffed back to the plane, and from there
23 we flew to the United States.

24 MR. KELLY: I have no further questions.

25 THE COURT: This is Lima, Peru?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. KELLY: Yes, Judge.

THE WITNESS: Yes, sir.

THE COURT: The Court takes judicial notice of the fact that Peru is a separate country from Chile.

Do you want to cross-examine?

MR. FRIED: Your Honor, before I make that decision, I would like a few minutes.

THE COURT: Take all the time you want.

We will take a five minute recess.

MR. FRIED: Thank you.

THE COURT: In the interim the Court would appreciate having the translator translate, if she will, the newspaper clipping at the request of the Government.

MR. KORMAN: Could we have it translated on the record?

THE COURT: Maybe it would be better if she just dictated it into the record now before you take your recess.

MR. KORMAN: Okay.

(At this point the translator, Miss Minsa, translated the newspaper article as follows:)

MISS MINSA: The heading says:

"Another six drug traffickers are taken to the United States."

The caption under the picture says:

"In the picture the police patrols are approach-
in the Braniff aircraft in order to take aboard another
six traffickers that the Chilean police has expelled
from the country in order to deliver them to the United
States justice."

"This picture has been provided by Telidario
Channel 7 of the National."

MR. FRIED: There is no date; right?

MISS MINSA: No, there is no date.

"Saturday afternoon another six Chilean traffickers
were taken to the United States. They have been in-
volved in the smuggling of drugs. They will be indicted
in that country for a conspiracy against the American
people."

"The six delinquents were arrested by personnel
of the Preventive Department of the Chilean Carbineros
under the command of Major Luis Fontaine Manriquez."

"The people in question, Serglo Lazo Vergas,
former officials of Santiago say, is considered to be a
partner of Adolfo Sobosky Tobias, who is the owner of
the horse stables and has been accused before the United
States Attorney of the United States, he has accused
his own partner, Jorgi Daved Sumar, who had a restau-

1
2 rant on Avenue Peru and who has been accused as the
3 manufacturer of several of the shipments of cocaine
4 that were brought into the United States by several
5 traffickers and also to Europe.

6 "Carlos Baeza, who is the former owner of the
7 restaurant Posada Granaderos, trafficker;

8 "Marc Campos who used to finance the ventures
9 of drug smuggling and who achieved a greater reputation
10 as the business man, but the police had never dared to
11 arrest him before during the previous regime;

12 "Carlos Choy Ceballos, who came from the region
13 of Arica, and who is considered to be the most expert
14 collaborator and manufacturer of the cocaine who has
15 ever existed in Chile;

16 "And also Senior Napoleon Poblete Mayorga, who
17 is a very well known delinquent who advanced within
18 the criminal field from being a burglar to being a
19 drug trafficker and also operating as a shop lifter and
20 a pickpocket.

21 "These six men have been expelled from the country
22 and they are going to meet the other fourteen traffickers
23 who were taken to the United States previously, approxi-
24 mately two months ago, among which was Adolfo Soboski
25 Tobias, Eduardo Yayorfritis and Vladimir Bandera."

And that is it.

MR. KORMAN: For what purpose is this being offered in evidence?

MR. KELLY: Just some background as to the truth of the matters in which the United States was brought into it.

MR. KORMAN: It is for the truth of the matters as to how they were brought to the United States, is that why it is being offered..

MR. KELLY: Yes, for whatever weight the Court wishes to give it.

THE COURT: Well, the Court will take judicial notice of the fact that there was a military hunta that overthrew the prior government in Chile and that during the period in question there were widespread arrests of political persons and others by the new regime, and that it is widely reputed that there was extensive torture of those that were arrested as part of the routine and regular practice as instituted by the regime on its own motion and not on the request of the United States.

The Court also will note from the probation report as well as from the letter marked as defendant's Exhibit A at this hearing and from the newsclipping, which will be marked as a defendant's exhibit, that this

defendant has a long criminal record by his own admission going back to the time when he was a child in Chile, both in two other South American countries and in the United States.

Is anything else you wish me to take judicial notice of?

MR. KELLY: No, your HOnor.

THE COURT: All right. You can decide what you want to do about cross-examination.

MR. KORMAN: For the record, we will object to the first part of what your Honor took judicial notice of regarding whatever practices may have been followed by the Chilean government.

THE COURT: I don't know what they did, but there is not any question that the reputé is widespread.

MR. KORMAN: I agree it is.

THE COURT: It is in the newspapers constantly.

MR. KORMAN: If that is what your Honor is taking judicial notice of, I have no objection.

THE COURT: I don't know what happened in Chile, I have never been in Chile.

You are objecting to my taking judicial notice of the reputé?

MR. KORMAN: No, I have no objection to your

1
2 taking judicial notice of whatever the general repute
3 is.

4 THE COURT: There have been statements made by
5 well-known members of the New York Bar, including
6 Martin Garbus, who reported on his interviews in Chile
7 as a part of a group that went down there on the invi-
8 tation of the Chilean government.

9 All right, we will take a five minute brake.

10 Mark this exhibit, please, in evidence.

11 THE CLERK: Defendant's Exhibit B.

12 (A ten minute recess was taken and at 12:35
13 o'clock p.m. the hearing resumed.)

14 MR. FRIED: The Government has several questions
15 that we would like to put to this witness, your Honor.

16 Shall I begin?

17 THE COURT: Please.

18 CROSS-EXAMINATION

19 BY MR. FRIED:

20 Q Mr. Poblete, you mentioned on your direct examina-
21 tion there came a time when you were taken from the airport
22 in Santiago, Chile; is that correct?

23 A Yes.

24 Q When you arrived at the airport, do you recall
25 who was present, when you arrived?

1
2 A We were taken there by policemen dressed up as
3 civilians and when we got aboard the plane there was a Mr.
4 Cecile and somebody else, Mr. Frunguli, and there was also a
5 Captain Maica of the Chilean police. And there also was a
6 Mr. Martin, he is from Investigation.

7 Q Now, had you seen Mr. Cecile before you boarded
8 the plane?

9 A No.

10 Q Had you seen Mr. Frunguli before you boarded
11 the aircraft?

12 A No.

13 Q Then when you got on the aircraft, where did you
14 sit?

15 A I was handcuffed to Daved, a man named Daved,
16 and we both sat together in the plane, Jorgi Daved.

17 Q Mr. Poblete, when you were on the aircraft,
18 were you seated in a certain section of the aircraft?

19 A Yes, all the prisoners and the policemen were
20 together, there were six people.

21 Q In what section of the aircraft was this?

22 A I believe it was in the rear section, but I
23 don't remember.

24 Q Now, when you were on the aircraft, were you pro-
25 vided with food and other liquors, were you allowed to eat?

1
2 A Yes, we received food.

3 Q Were you allowed to go to the bathroom on the
4 airplane?

5 A Well, I didn't go to the bathroom myself but
6 other prisoners who were with me, I remember they did go.

7 Q While you were on the airplane, were you allowed
8 to sleep?

9 A I did not sleep, I was handcuffed to the other
10 man and I was very nervous.

11 Q Did any of the other Chilean prisoners aboard
12 the aircraft with you, could they sleep?

13 A I didn't see because they were two and two and
14 two, we were separated, the policemen were with us.

15 Q Now, at the time you were travelling on this
16 aircraft from I believe you said Santiago, Chile, to Lima,
17 Peru, were you at any time tortured?

18 A No.

19 Q At any time as you travelled from Lima, Peru,
20 ultimately to the United States on board this aircraft, were
21 you tortured?

22 A No.

23 Q When you got on the airplane as you earlier
24 stated, this was the first time that you saw these American
25 agents, Mr. Cecile and Frunguli; is that correct?

1
2 A Well, when we got into the plane they were there,
3 yes.

4 MR. FRIED: I have no further questions.

5 THE COURT: Any re-direct?

6 MR. KELLY: No, Judge.

7 THE COURT: Do you have any other witnesses?

8 MR. KELLY: I would just say, your Honor, I
9 have one other problem, and it is in these cases and
10 that is it is very difficult for a defendant's counsel
11 in going to South American to try to get the complete
12 cooperation of the officials there with respect to the
13 investigation, and I wouldn't say this is a Brady situa-
14 tion, but it is analagous to a Brady situation in that
15 I think it is most difficult for a defendant to produce
16 any witnesses because of the difficulties defense counsel
17 run into in trying to obtain them. So it is really in-
18 cumbent on the United States to bring forth information
19 which is peculiarly within their control in order to
20 meet the allegations of the defendant.

21 I have in mind the Chung case, I realize that in
22 the Chung case the Government did not have to come for-
23 ward, but I would like to call Mr. Fisher, who has gone
24 to South America from the point of view of how diffi-
25 cult it is for a defense counsel to get the proper

1
2 cooperation to really support the allegations in the
3 fashion that the Court perhaps might like then.

4 MR. FRIED: I would object to this witness testi-
5 fying at this point.

6 THE COURT: I assume it is difficult.

7 I don't think, unless Mr. Fisher has some know-
8 ledge of this particular transaction, I don't see any
9 point in having him as a witness.

10 MR. KELLY: As far as I know Mr. Fisher's focus
11 was on Mr. Baeza in this particular case, your Honor,
12 but he did have, as is indicated to me, some problems
13 in getting cooperation in South America, and he also
14 indicated that he had spoken with at least two Chilean
15 authorities on the law who had indicated to him when
16 a defendant is expelled from the country he is only
17 given a choice as to the place where he may be sent.

18 THE COURT: Does the Government have any informa-
19 tion that the United States agents participated in the
20 torture of this defendant, assuming he was tortured?

21 MR. FRIED: The Government has no information of
22 that kind whatsoever, your Honor, in fact I might say,
23 for purposes of the record, that I returned last night --
24 rather yesterday afternoon, it was a business trip to
25 Chilea and Argentina in connection with -- not with

this case but with another case, United States versus Baeza, and I am aware -- I was aware of the expulsion of this defendant at the same time that the other five defendants were who were reported in the newspaper article, and Carlos Baeza was one of those defendants, and while I was away in Chile I inquired into the circumstances of the expulsions and whether the American authorities, the American agents down there participated, and I was informed that the American authorities did not aid or procure counsel for any of the expulsions that are alleged to have occurred in this case.

THE COURT: All right.

The hearing is now closed.

MR. KORMAN: There is one point in addition, your Honor, which I would like the record to show, and that is that at the time he was put onto a plane in Chile, there was an indictment outstanding, there was a bench warrant outstanding for his arrest, and he had no right under the laws of or the constitution of the United States to be free of the custody of the United States Law Enforcement authorities.

Of course, your Honor, there was also an expulsion order which the article which was published in South

Poblete-cross

34

1
2 America indicates, there was an expulsion order from
3 Chile, and we would be prepared to offer the expulsion
4 order as evidence that this was an act of the Chilean
5 government, and therefore this distinguishes this case
6 from Toscanino on another point, which otherwise would
7 be retroactively applied and applicable here, since
8 the Court of Appeals has suggested as an alternate to
9 "kidnapping," that is as to someone for whom an arrest
10 warrant is outstanding in the United States and who
11 is in a foreign country, that efforts be made to obtain
12 the cooperation of the foreign government and in agree-
13 ing to his surrender to the United States law enforce-
14 ment authorities, and the very exhibit attached to the
15 motion filed on behalf of the defendant and issued con-
16 temporaneously with the expulsion, and before any de-
17 cision of any Court was made which would have indicated
18 that that point was relevant, it clearly shows that
19 he was expelled by order of the Chilean Government.

20 Whether the military hunta is applying correct
21 law is not the proper concern of the United States
22 Court.

23 THE COURT: The Court will take judicial notice
24 of the fact that the Government involved is recognized
25 by the United States as both de facto and de jure.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. FRIED: For the purposes of the record, the United States recognized the hunta of the Republic of Chile on September 24, 1973.

THE COURT: Taking the defendant's testimony at face value, this court does have jurisdiction.

There seems to be no doubt that for some years the Government of the United States has sought the cooperation of the Government of Chile in obtaining the extradition under Chilean laws of a number of those who have been indicted and convicted, and in one case at least of various drug crimes.

There is no evidence that the United States Government participated in any illegal activities in Chile or in this country in connection with the expulsion of the defendant. He was known to the police of Chile as a habitual criminal and one who had been indicted in this country in a legal and lawful manner.

It was not inappropriate under the circumstances for this Government to request the cooperation of the Chilean Government in obtaining the extradition of this defendant.

This Court has no power to inquire into the operations of the Chilean laws and the nature of their extradition or expulsion procedures.

Poblete-cross

36

1
2 Upon delivery of the defendant to the American
3 agents, according to the law of Chile, so far as can
4 be determined by this court, he was transported upon
5 the basis of an arrest warrant issued in this court
6 following indictment.

7 That indictment, so far as this court can deter-
8 mine, is valid.

9 He was transported by what the court can take
10 judicial notice to be was a normal, civilian airline,
11 Braniff Airline, on a regularly scheduled flight to
12 this country.

13 He was not interrogated nor treated improperly
14 by any American agent once they obtained custody.

15 Under the circumstances, the Court does not
16 believe that the Toscanino case has any application.

17 The exercise of this court's jurisdiction, there-
18 fore, was proper.

19 In view of the fact that the defendant's counsel
20 has not had an opportunity to examine the pre-sentence
21 report, he will be given that report now to examine
22 and discuss with the defendant with the aid of the
23 interpreter.

24 The matter is placed on the calendar for senten-
25 cing at 2:30 this afternoon.

Poblete-cross

37

1
2 All right.

3 Thank you. Anything further?

4 MR. FRIED: One thing, your Honor, I have to be
5 before Judge Mishler's court at a quarter to two. It
6 might take longer than 45 minutes.

7 Can we set it down for 3:00 o'clock?

8 THE COURT: Try to get here as soon as you can.

9 MR. FRIED: Fine.

10 * * *

End EK

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 MR. KELLY: I don't think the defendant is here
2 and the interpreter is not here. I think we have
3 reached a resolution of this case. I would need some
4 time to talk to the defendant. There are mechanical
5 problems in waiving indictment, waiving the Leary
6 defense and a few things like that.

7 THE COURT: Work it out. I'll be here all day.
8 Whenever you're ready, I'll see you.

9 MR. KELLY: Thank you.

10 THE COURT: Second call.

11 (Recess.)

12 (Continued on next page.)
13
14
15
16
17
18
19
20
21
22
23
24
25

FK fls

1 THE COURT: Have you had an opportunity to dis-
2 cuss the probation report with your client?

3 MR. KELLY: Yes, I have, judge. I'm returning
4 the probation report to the Court.

5 I have discussed it with the defendant. He
6 feels that it is a fair and comprehensive expression
7 of his background.

8 THE COURT: And the interpreter is continuing
9 to interpret.

10 MR. KELLY: Yes.

11 THE COURT: I'll hear you on the sentence.

12 MR. KELLY: Judge, I would just like to bring
13 to you attention what is clear from the report that
14 this defendant has pleaded guilty. There is some
15 indication in the report that he, in view of the agents,
16 is not as culpable as his brother was and also there is
17 some indication that the defendant has cooperated, al-
18 though it has not been fruitful to this point. I
19 believe the defendant will continue to cooperate and if
20 his cooperation is fruitful in the future, I will, at
21 some future time, within the 120 days, make an applica-
22 tion to the Court under Rule 35, but I think the report
23 indicates that the defendant had a very irregular and
24 impoverished childhood.

25 He had to fend for himself very early. It was

1 not to be unexpected that he would fall into a life
2 of crime and, unfortunately, it led to the very serious
3 charges before the Court now.

4 I would ask your Honor in view of all the circum-
5 stances in the case to be as lenient in imposing sen-
6 tence as you can be.

7 THE COURT: Do you want to add anything to what
8 your attorney has just said?

9 THE DEFENDANT: I am just asking your Honor for
10 clemency. I have suffered a lot during these past
11 months. I'm just praying to God that he gives me an
12 ounce of strength to become an honest man in the future.

13 THE COURT: This is a serious crime. The Govern-
14 ment was lenient in permitting the defendant to plead
15 guilty to a reduced count, because he faced at least
16 fifteen years in jail.

17 In view of the harsh treatment which he personally
18 received in Chile as a result of torture and in view
19 of his cooperation in plea of guilty showing some con-
20 trition, I sentence him only to five years.

21 MR. KELLY: Thank you very much, Judge.

22 MR. FRIED: At this time the Government moves to
23 dismiss in accordance with our agreement, indictment
24 72CR871.

25 THE COURT: Granted.

1

MR. KELLY: Thank you.

2

MR. FRIED: Thank you.

3

THE COURT: Good luck.

4

THE DEFENDANT: Thank you very much, your Honor.

5

* * *

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

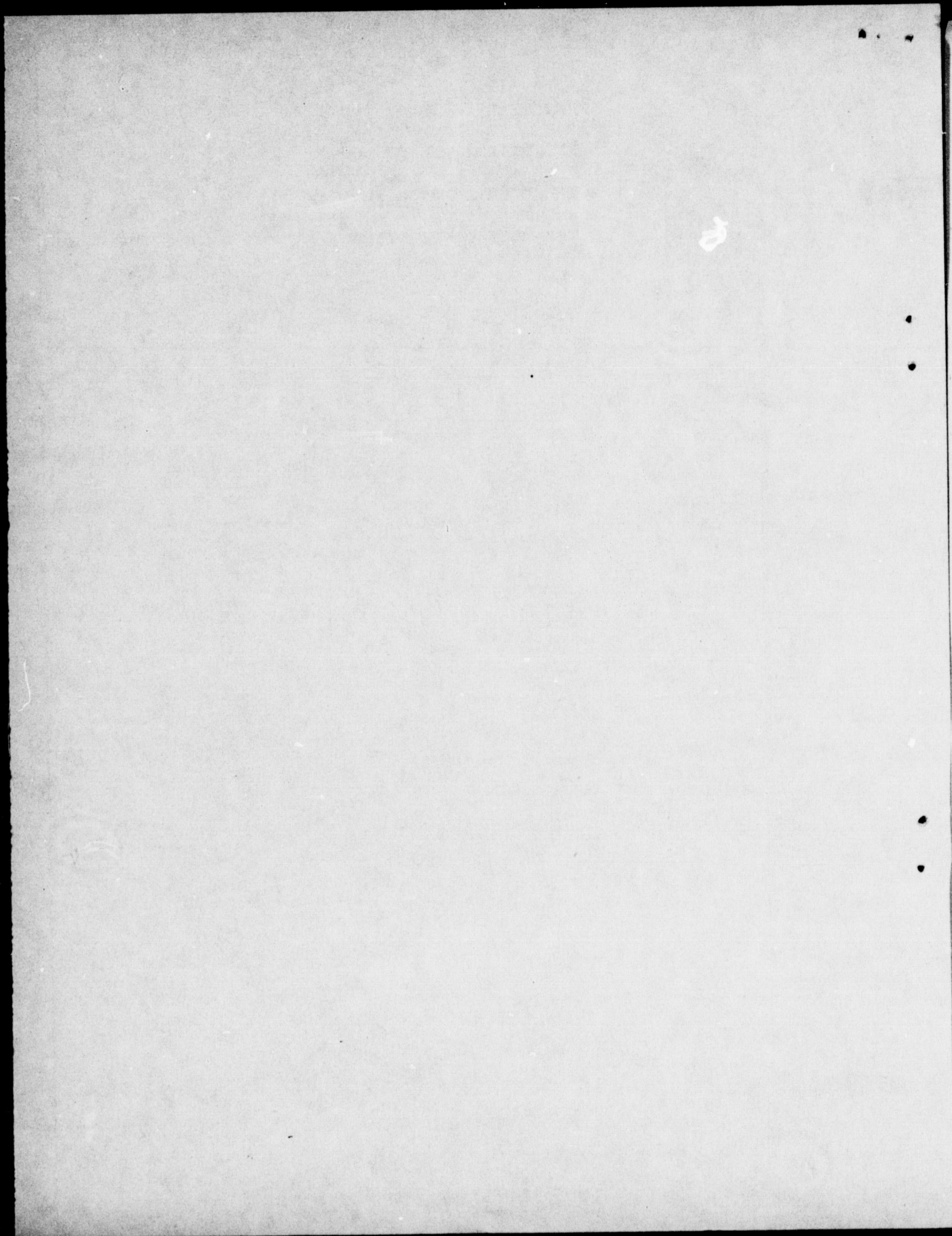
21

22

23

24

25



NOT 3-600000
JAN 27 1976
FBI - NEW YORK
RECEIVED

RECEIVED
JAN 27 1976
FBI - NEW YORK
RECEIVED